



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL APPEAL NO. 58 OF 2019

PENTAGON COMMUNICATION LIMITED.....PLAINTIFF

-VERSUS-

BOROSIL GLASS WORKS LIMITED.....DEFENDANT

R U L I N G

1. **PENTAGON COMMUNICATION LIMITED** filed this appeal against the decision of the Assistant Registrar of Trade Mark. The decision of the Assistant Registrar was delivered on 14th December 2009. The appeal before the Civil Division of Milimani Court was filed in March 2010. It was served on the Respondent, **BOROSIL GLASS WORKS LIMITED**, on 17th March 2010.

2. The Respondent has filed a Notice of Motion dated 13th August 2018 which is under consideration in this Ruling. By that application the Respondent seeks dismissal of this appeal for want of prosecution.

3. The application is supported by the affidavit of Vibhava Sawant. He is the head Legal of the Respondent. The Respondent is a company registered in India. The deponent of that affidavit stated thus:

- *“That I am aware that being dissatisfied with the Ruling of the Assistant Registrar of Trademarks dated 14th December 2009, the Appellant filed this Appeal in Court on 5th March 2010.*
- *That in the Ruling of 14th December 2009, The Assistant Registrar of Trade Marks allowed the Applicant’s Opposition to the Appellant’s application for registration of its mark “BORROSIN”, thereby stopping the said intended registration.*
- *That I am further aware that the matter came up in Court on 13th November 2015 when the Honourable Judge directed the Appellant to file its Memorandum of Appeal within 7 days and the Respondent to file its response thereto within 14 days thereafter.*
- *That the matter was last in Court on 28th January 2016 for purposes of confirming whether the parties had complied with the Court’s directions issued on 13th November 2015. However, there was no appearance by the Appellant.*
- *That since then, the Appellant has failed to either file its Memorandum of Appeal as directed by the Court, or take any steps to have the Appeal heard and determined.*
- *That the Appellant has not taken any steps to prosecute this Appeal for the last two and a half years.*
- *That I believe that he prolonged delay in prosecution this matter has and continues to greatly prejudice the Respondent/Applicant in terms of anxiety, time expended and legal costs incurred in prosecuting the matter. The Respondent/Applicant ought not to be called upon to defend an action that the Appellant is not keen on prosecution.*
- *That in view of the inexcusable and inordinate delay in the prosecution of this Appeal since 28th January 2016, it is in the interest of justice that this application is allowed.”*

4. The Appellant opposed the application through the affidavit of Ashok Doshi, its Managing Director (M.D.). He stated thus:

- *“That I have read through the Application dated 13th August 2018 and the Supporting Affidavit thereto under guidance of my Advocates on record M/S Kadima Esq and understood the same reply to the same in the following paragraphs.*
- *That, I am advised by my Advocates M/S Kadima Esq which advise I believe to the true state that my applicant is entitled to the orders sought in the Application based on the grounds therein and in the supporting Affidavit.*
- *That, I am informed by my Advocate M/S Kadima Esq which information I believe to be true that the Application dated 13th*

August 2018 only raises technical issues which do not go to the root of the substantive issues raised in the Memorandum of Appeal.

- *That, I am informed by my Advocates M/S Kadima Esq which information I believe to be true that the Application dated 13th August 2018 is misconceived because the Memorandum of Appeal dated 3rd April 2019 is properly on record as it has been properly filed before this Honourable Court and properly served upon the Respondent/Applicant on 26th April 2019.*
- *That, I am informed by my Advocates and which information I believe to be true that the Memorandum of Appeal dated 3rd April 2019 being on record means that the Appellant/Respondent has taken the necessary steps to prosecute this Appeal.*
- *That, I am informed by my Advocates M/S Kadima Esq which information I believe to be true that her Respondent's application is premised on what is regarded as a procedural technicality of filing the Memorandum of Appeal late. The Constitution of Kenya under Article 159(2) (d) cures such technicalities.*

ANALYSIS

5. The appeal, as stated before was filed on 5th March 2010. This was when this matter was in the Civil Division of Milimani Court. The file was transferred to the Commercial & Tax Division of Milimani on 14th February 2019. It was fixed for mention for directions on 7th March 2019. The Appellant did not attend Court on that day. Only the Respondent attended. After other adjournments today's date was fixed for this Ruling to be delivered.

6. But it is important to look holistically at the activities in this appeal.

7. The Appellant did not as deponed by the Respondent Legal Officer, file a Memorandum of Appeal. It simply filed the record of appeal minus the Memorandum of Appeal. Further in looking through the correspondence in the Court file it is obvious that not once did the Appellant seek to have this matter listed either for mention/directions or hearing. The few letters which are there, and which resulted in Court attendances from March 2010 to September 2011, were written to Court by the Respondent. The matter was listed on 8th February 2019 in the Civil Division for parties to show cause why the suit should not be dismissed for want of prosecution and it was on that day the matter was transferred to the Commercial & Tax Division.

8. There is no doubt in my mind that the Appellant has failed to follow up this appeal with the required diligence. There is no explanation offered by the Appellant why it failed to act. The Appellant mentioned in its M.D's affidavit having filed a Memorandum of Appeal on 3rd April 2019 but that Memorandum is not on Court record and it was not attached in the said affidavit. Even if it was filed my finding is that there is inordinate and unexplained delay in the prosecution of this appeal. This Court had to consider an application for dismissal of a suit for want of prosecution in the case **THIKA COFFEE MILLS LIMITED V GAKUYU FARMERS CO-OPERATIVE SOCIETY & 2 OTHERS [2019]** where the Court had this to say:

*“The delay occasioned in the prosecution of this case is similar to that which was considered in the case **BEVERAGE BOTTLERS (SA) LTD (IN LIQUIDATION) & ARVO – V- ABODE ENTERPRISES PTY LET (2009) SASC 272** a case of South Australia, which case I find persuasive, where the judges stated:*

“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party's litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case.”

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.”

17. I am of the view that the time has come for this Court to say to the Plaintiff, you have dilly-dallied long enough with the conclusion of this case.”

9. It is due to my finding that there has been inordinate and inexcusable delay on the part of the Appellant; and also as stated by the Respondent that it is prejudiced by that delay, that I find there is merit in the application.

CONCLUSION

10. In view of the above I make the following orders:

a. This appeal is hereby dismissed for want of prosecution.

b. The costs of the Notice of Motion dated 13th August 2018 and the costs of this appeal are awarded to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 28TH day of NOVEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT